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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-89

EVANS THEATRE CORPORATION d/b/a LOEW'S GRAND THEATRE, JOHN MARVIN SMITH AND JOHN HEBERT,

Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Georgia on March 4, 1971, and the Motion For Rehearing denied on March 18, 1971.

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at 227 Ga. 377, ____ S.E. 2d ____. The Order

overruling the Motion For Rehearing is without an opinion, and is noted at 227 Ga. 377, ____ S.E. 2d ____. Both judgments are printed in Appendix A.

JURISDICTION

The decision of the Supreme Court was entered on March 4, 1971. Timely application for rehearing was filed and denied on March 18, 1971. On June 11, 1971 Mr. Justice Black extended the time within which to file a petition for a writ of certiorari up to and including July 17, 1971.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3) since rights, privileges and immunities guaranteed to petitioners by the United States Constitution were infringed by the judgment of the Georgia Supreme Court.

QUESTIONS PRESENTED

I. Are the Georgia Nuisance Statutes constitutionally inadequate as a means of controlling obscenity since there are no procedural safeguards to protect legitimate expression?

II. Are the Georgia Nuisance Procedures and Statutes constitutionally defective since no burden is placed on the censor-prosecutor to come forward with evidence and the censor-prosecutor presented no evidence at the trial?

III. Is the film, *I Am Curious* (*Yellow*) constitutionally protected expression?

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

First Amendment

> Congress shall make no law respecting on establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The Georgia Nuisance Statutes are set forth in Appendix B.

STATEMENT OF THE CASE

A complaint was filed on September 30, 1970 by the district attorney and solicitor general to enjoin and seize the movie, *I Am Curious (Yellow)*, and to declare it obscene within the meaning of 26 Ga. Code 2101. A hearing was scheduled for the next morning October 1, 1970, the day the movie was due to commence showing, but was delayed till October 2 because of the filing of a removal petition (R-63). The movie began its run on October 1.

Counsel for petitioners (hereafter called the theatre) asked for a continuance to prepare the defense (R-64), but this was denied because petitioners would not agree to discontinue showing the movie pending a continuance. Counsel for petitioners from the start questioned the legality of the proceedings below (R-69). There is no code section for such a seizure, no standards are set as to time limits and appeal procedure (R-78). The problem of self incrimination that might arise from turning over a film upon which later criminal proceedings may be based is left unresolved (R-70). See *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (ED La. 1969). Respondents (hereinafter called the State) were apparently proceeding on the theory that the hearing was some sort of adversary hearing required before the film could be seized, if found obscene.

The unverified complaint alleges that the dominant theme of *Curious* appeals to the prurient interest *and* that it substantially exceeds customary standards *and* that it is wholly without redeeming social value (R-36-38). The State introduced no testimony, relying entirely on the showing of the film to establish its case. (It did submit the scenario; Respondent's exhibit No. 1).

While admitting that there were "much worse" movies showing in Atlanta (R-80; see also R-95), the State contended that *Curious* was obscene because its sexual scenes, approximately ten to fifteen minutes of a movie lasting about two hours (R-113), were unrelated to the political and social themes of the movie (R-92, 93). The State seems to say that the portrayal of actual or simulated cunnilingus and fellotio would per se make the movie obscene (R-90).

The State also attempted, without evidence and over

objection, to blame *Curious* for the present state of movies in the United States (current community standards?). It claimed that "now in practically every city in the United States" you find films "in which every perversion is shown for the entire duration" (R-95). When counsel for the theatre objected to the lack of evidentiary basis for attributing this alleged state of affairs to *Curious*, the trial judge said he would nevertheless "take it into consideration" (R-96).

The theatre unsuccessfully contended that the court below was precluded by a type of res judicata or was estopped from holding *Curious* to be obscene because of the decision of *I Am Curious* v. *U.S.A.*, 404 F. 2d 196, (2nd Cir. 1968) holding the movie to be non obscene (R-71). The theatre put on testimony by two competent witnesses that the dominant theme of *Curious* is not to the prurient interest (R-125, 126), that it concerns a young girl searching for her political, social, religious and sexual identity (R-110). Several of the sexual scenes have a direct and obvious political meaning (R-111). The sexual aspect of the movie is necessary to personalize the heroine's search and to keep the movie from being a mere political commentary (R-125). A number of favorable reviews attesting to the worth of the movie were put in evidence (Petitioners' exhibits 1-10; R-210-227). The subdued nature of the advertising for the movie was shown (R-77, 78; Petitioners' exhibit 12; R-230). The film is a good example of "naturalistic cinemaphotography" (R-124).

Other films being shown in the Atlanta community are more sexually explicit than *Curious* (R-106). Some relate only to sexual matters (R-117). It was never quite clear what standard of obscenity, national or local, was

being followed. The State pointed out that there had been an initial finding that *Curious* was "against the national standards" (R-81), which was later reversed by the decision at 404 F. 2d 196. But the trial judge found that "the moral standards of *this* community go far beyond that set by" *Curious* (R-134).

The trial judge admitted that large parts of *Curious* had political and social content. He pointed out that the first forty-five minutes were concerned entirely with the heroine's search for truth, honesty and morality (R-132, 133). He admitted that he did not know what was being shown in other theatres or even of the existence of some of them (R-133). The theatre asked unsuccessfully that he view some of the films of these other theatres, even offering to pay the admissions (R-104).

The judge would not be pinned down as to whether *Curious* was "utterly" without social worth (a finding required by 26 Ga. Code 2101, as well as the decisions). To the question of whether it was utterly without social worth, he replied: "I am finding this movie is obscene within the purview of the Georgia law" (R-136). He would not allow time for the theatre to file a brief (R-132).

The theatre asked that the appeal and the preparation of the record be expedited (R-136; notice of appeal R-30). The hearing was held on October 2, 1970. The record was docketed in the Supreme Court of Georgia on November 5, 1970, and the decision was rendered on March 4, 1971.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS THEREFORE INCORRECT.

A. *The Writ should be granted since the Georgia Nuisance Statutes have no procedural safeguards to protect legitimate expression, and are constitutionally inadequate as a means of controlling obscenity.*

Georgia Code Section 72-101, 72-102, 72-201 and 72-202 sets out a statutory scheme for the prohibition and abatement of nuisances. Nothing is mentioned about exhibiting obscene films. Georgia Code section 72-3 is entitled "Houses of Prostitution," and the statutes under this section again make no mention of the exhibiting of obscene films. Georgia Code Section 72-4 is entitled "Nuisances in Cities" and 72-401 gives the police court jurisdiction to abate a nuisance.

The decision of the Georgia Supreme Court made no reference to which statute the State was proceeding under, but did cite as authority *Lee* v. *Hayes*, 215 Ga. 330, 331, 110 S.E. 2d 624 (1959). In that case Georgia Code sections 72-201 and 72-301 are cited as giving the solicitor general a cause of action for abatement of a public nuisance, being the operating of a lewd house. In the *Lee* case the petition alleged gambling was going on, and illegal beer and whisky was being sold.

The Georgia statutes have insufficient procedural safeguards for dealing with obscenity. Ga. Code section 72-303 gives the defendant three days' notice, and if he asks for a continuance the temporary injunction shall be granted as a matter of course. Apparently the final trial shall be at the first term of the court (Ga. Code

section 72-305). In the Fulton County Superior Court the average time to get to a jury in a civil case is approximately thirteen months. (Findings of May-June 1971 Fulton County Grand Jury). The Georgia rule that equity cases shall be tried at the first term is a relic of the past. Also terms of Court vary from two months in Fulton County to as much as six months in certain rural counties.

Georgia Code section 72-302 permits an ex parte injunction. Georgia Code sections 72-304, 72-306, 72-308, 72-309 and 72-311 provide stiff penalties if the temporary injunction is violated. A clear reading of these statutes show that once the temporary injunction is granted the suppression of the film is, in essence, complete.

In the instant case the Court issued the temporary injunction on October 2, 1970, and a decision by the Georgia Supreme Court was not rendered until March 4, 1971. Counsel for petitioners acted as quickly as possible in prosecuting the appeal, but it still took over five months for an appellate decision.

It is apparent that such a scheme, when applied to the delicate problem of separating constitutionally-protected materials from those which may be regulated by government, falls short of the required constitutional standard under the First and Fourteenth Amendments.

First, no standard of what constitutes a statutory nuisance appears in the statute. The overbreadth of the statutory description of what is prohibited is inimical to obscenity standards enunciated in recent Supreme Court decisions. See *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); *Redrup* v. *New York*, 386 U.S. 767 (1967); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Second, despite the penalties of a harsh and quasi-criminal nature, the statutory scheme makes no provision for a requirement of *scienter*, criminal intent or guilty knowledge, an essential ingredient of legitimate governmental regulation of obscenity. *Smith* v. *California*, 361 U.S. 147 (1961).

Third, the statute shifts the burden of proof of the non-obscenity of the material charged to be a nuisance to the accused, although the burden of proving that material is obscene, and therefore, unprotected expression, must rest upon those who would suppress it. See *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

Fourth, the statute allows ex parte injunctions against nuisances, including films claiming First Amendment protections, without a prior adversary determination of the obscenity of the material restrained or in the alternate the temporary injunction is granted if the defendant asks for a continuance. Such a statutory scheme is clearly prohibited under decided Supreme Court case law. *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

Fifth, although the statutory scheme permits pre-censorship of materials which claim First Amendment protection, it provides no procedural assurance of an immediate hearing, after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review. Such a censorship system is constitutionally impermissible. *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Freedman* v. *Maryland*, 380 U.S. 51

(1965); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141-142 (1968).

Sixth, the statute makes no distinction between private possession and public dissemination of obscene materials charged as nuisances, and applies sanctions against both. Governmental regulation of private possession and use of obscenity is constitutionally impermissible. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Seventh, the penalties are so broad and sweeping (including the closing of a theater for a year even as to exhibition of non-obscene films; see Georgia Code section 72-309) and so unnecessarily oppressive and punishing as to inhibit the resolution of such constitutional questions as the obscenity of particular materials in courts under procedures designed to safeguard the dissemination of borderline materials. *Smith* v. *California*, 361 U.S. 147 (1961); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Thus, it is apparent that the Georgia Nuisance Statute as an instrument of governmental regulation of obscenity, falls short of the constitutional mark. It is now beyond argument that "[s]tate regulation of obscenity must 'conform to procedures that will insure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line' *Bantam Books* v. *Sullivan*, [372 U.S. 58, 66 (1963)]." *Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964).

Two courts have come to grips with whether a state can control obscenity on the theory of a public nuisance in an equity proceeding. In *Grove Press* v. *Philadelphia*,

418 F. 2d 82 (CA 3, 1969), and *Commonwealth* v. *Guild Theatre, Inc.*, 432 Pa. 378, 248, A. 2d 45 (1968), it was held that, on strikingly similar set of facts as the instant case, the State of Pennsylvania procedural scheme lacked the safeguards citing *Freedman* v. *Maryland*, supra.

Appellants are aware of no case in which this Court has yet considered the constitutional implications of a nuisance statute of the type here involved. In an area in which sensitive control procedures are constitutionally compelled, this Court's consideration of this issue is imperative.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *The writ should be granted since no burden is placed on the censor-prosecutor to come forward with evidence under the Georgia Nuisance Statutes, and the censor-prosecutor presented no evidence at the trial.*

The trial court ordered the respondents to bring the film to court for showing based on the complaint filed by the respondents (R-39). The respondents presented no evidence during the trial except the showing of the film.

In *Freedman* v. *Maryland*, *supra*, at page 58 the Supreme Court said:

> "First, the burden of proving that the film is unprotected expression must rest on the censor."

In *Speiser* v. *Randall*, 357 U.S. 513, 526, it was held that:

> "Where the transcendent value of speech is involved, due process certainly requires . . . that the

state bear the burden of persuasion to show that appellants engaged in criminal speech."

Petitioners also rely on *United States* v. *Klaw*, 350 F. 2d 155 (2nd Cir., 1965) and *Hudson* v. *United States*, 234 A. 2d 903 (Ct. App. D.C. 1967) where the failure of the government to prove contemporary standards required the granting of a motion for directed verdict.

Applying the foregoing law to the instant case, the trial court was compelled to find *I Am Curious* (*Yellow*) not obscene since the State of Georgia did not carry the burden.

III. THE CASE IS OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT.

A. *The Writ should be granted since the film is Constitutionally Protected Expression.*

Ever since *Roth* v. *United States*, 354 U.S. 476 (1957), this Court has assumed the responsibility of devising formulae for recognizing the "dim and uncertain line," *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963), which separates obscenity from protected expression.

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression, a majority of the Court has yet to agree on a precise test for determining obscenity.

The current verbal formula which probably represents a consensus of the Court first appeared in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).

"Under [the Roth] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest

in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters; and (c) the material is utterly without redeeming social value."

That this formula has been unsuccessful in providing guidance to lower state and federal courts in determining whether the film in issue here is entitled to constitutional protection is readily apparent.

Applying these criteria, the Second Circuit Court of Appeals held the film to be constitutionally protected expression. *United States* v. *I Am Curious (Yellow)*, 404 F. 2d 196 (CA 2, 1968). That Court, applying the *Memoirs* standards, found "that the picture cannot be classified as obscene on at least two of the three grounds comprising the test." The Court continued:

"Although sexual conduct is undeniably an important aspect of the picture and may be thought of as constituting one of its principal themes, it cannot be said that 'the dominant theme of the material taken as a whole appeals to a prurient interest in sex.' Whatever the dominant theme may be said to be (see footnote 2 supra) it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as 'prurient.'

"It is even more clear that 'I Am Curious' is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the 'experts' who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present

these ideas artistically. It falls within the ambit of intellectual effort that the first amendment was designed to protect."

Lordi v. *UA New Jersey Theaters, Inc.*, 108 N.J. Supp. 19, 259 A. 2d 734 (1969), reached a similar result.

Applying identical criteria, however, the Maryland Court of Appeals, albeit by 4-3 decision, held the very same film to be obscene, *Wagonheim* v. *Maryland State Board of Censors*, 258 A. 2d 240 (Md. 1969). The Supreme Court affirmed by an equally divided court. *Grove Press, Inc.*, et al. v. *Maryland State Board of Censors*, ___ U.S. ___, 28 L ed 2d 205 (1971).

These disparate results in judicial attempts to classify the same film as inside or outside First Amendment protection, characterized by narrow majorities and vigorous dissents, demonstrate not only the uncertainty of application of this Court's obscenity standards in the various state and federal jurisdictions in the nation, but the need for this Court to speak on the issue here presented.

The record in the case at bar provides an abundant opportunity for this Court to unify these fragmented and irreconcilable decisions. Despite the fact that the burden of proof of the obscenity of a film must rest upon those who would suppress it, *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), petitioners presented sufficient evidence that the film was not obscene and bringing the film under the protection of *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).

This case allows the Court to clarify what is now obscure, and to make more consistent the administration of its own constitutional doctrine. For uncertainty of

application of law, always difficult under any circumstances, is intolerable where freedom of expression is involved.

In *Redrup* v. *New York*, 386 U.S. 767 (1967), "which may yet prove to be the most significant of its obscenity opinions," *Commonwealth* v. *Dell Publications*, 427 Pa. 189, 233 A. 2d 840 (1967), the Court, faced with the issue of the obscenity of such literary gems as two paperback books entitled "Lust Pool" and "Shame Agent," and ten so-called "girlie" magazines, noted its own philosophic differences on the general subject of obscenity, and, for the first time, abandoned any attempt to articulate a precise test for determining what it is. Instead, the *per curiam* opinion focused its attention upon several specific kinds of conduct by a purveyor which government may have a more significant interest in controlling, and which, if present in the *Redrup* cases, might have evoked a more punishing response from the Court.

> "In none of the [Redrup] cases was there a claim that the statute in question reflected a specific and limited, state concern for juveniles. See *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 * * *. cf. *Butler* v. *State of Michigan*, 352 U.S. 380 * * *. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *City of Alexandria*, 341 U.S. 622 * * *; *Public Utilities Commission of District of Columbia* v. *Pollak*, 343 U.S. 451 * * *. And in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg* v. *United States*, 383 U.S. 463 * * *." 386 U.S. at 769.

The Ninth Circuit Court of Appeals has concluded

that "rotten books [and films] * * * obsessed with sex," without literary merit, which "at best * * * are junk" are, according to current constitutional doctrine, protected by the First Amendment, unless accompanied by "pandering," distribution to juveniles or an obtrusive assault on unwilling adults, the only "proscriptions left." *Grant* v. *United States*, 380 F. 2d 748, 749 (9th Cir. 1967).

This Court must make its own determination as to whether the film is "utterly without redeeming social value." It is submitted that this Court could not sit through the first 45 minutes of the film (there is no sexual matter in the film up until that time) and fail to understand that Lena is a young girl who is curious and actually more than curious! She engages in extensive questioning of the political and social values of her country and her personal values. One cannot help but equate this young woman and her questioning and rebellious spirit to the youth of our country today and their questioning of "the establishment." The story is very relevant today and the sexual matter in the film is related to Lena's search for honesty in all levels of her life and in her search for equality.

If this Court will apply national community standards (*Jacobellis* v. *Ohio*, 378 US 184; 1969) and view the film as to its social value, rather than weigh the sexual matter standing alone, outside the theme, it will conclude that the finding of obscenity is erroneous and should be reversed.

CONCLUSION

This Petition For A Writ of Certiorari has attempted to present a brief description of the substantial issues presented and why this Court should give plenary consideration to them. The lower courts, federal and state, are in direct conflict to each other as to the issues raised. The protection of freedom of expression is paramount in a free society.

For the above reasons the Petition For Writ of Certiorari should be granted, the judgment below reversed, the Georgia statutory scheme be declared constitutionally inadequate as a means of controlling obscenity and the film be returned to petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing Petition For A Writ of Certiorari to Honorable Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, Hon. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia and Hon. Hinson McAuliffe, Solicitor General of the Criminal Court of Fulton County, Civil and Criminal Court Building, Atlanta, Georgia on the _____ day of July, 1971.

GLENN ZELL

APPENDIX A

OPINION OF THE GEORGIA SUPREME COURT

26249. EVANS THEATRE CORPORATION et al. v. SLATON.

1. The trial court did not err in finding the film "I Am Curious (Yellow)" to be obscene.

2. The courts of this State are not estopped from finding a film obscene because of a holding by the United States Court of Appeals, Second Circuit that the same film is not obscene.

3. The State has an interest in the welfare, peace, and good order of its citizens and communities, and may in a proper case maintain an action at the instance of the district attorney to enjoin an existing or threatened nuisance, even though the nuisance constitutes a crime punishable under the criminal laws.

4, 5. The injunction in the present case must be considered as an interlocutory one, and the obscene material can not be destroyed as contraband at the interlocutory stage.

6. The trial judge did not abuse his discretion in denying a continuance to appellants.

7. It is a crime under our criminal law (*Code Ann.* § 26-2101) to exhibit an obscene film to the public even though minors are not invited to view it.

ARGUED JANUARY 13, 1971—DECIDED MARCH 4, 1971—REHEARING DENIED MARCH 18, 1971.

Injunction. Fulton Superior Court. Before Judge Shaw.

Albert M. Horn, Glenn Zell, Margie Pitts Hames, for appellants.

Lewis R. Slaton, District Attorney, Hinson McAuliffe, Solicitor, Thomas E. Moran, Frank A. Bowers, Keating, Clancy, Bertsch & Johnston, for appellee.

MOBLEY, Presiding Justice. Lewis R. Slaton, District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, brought a complaint in Fulton Superior Court against Evans Theatre Corporation, operator of Loew's Grant Theatre, a motion picture theatre in Atlanta, and Marion Smith and John Herbert, managers of the corporation, alleging that defendants have advertised in the local papers the showing of a film, "I Am Curious (Yellow)," which is obscene within the definition of obscene materials in *Code Ann.* §26-2101 (Ga. L. 1968, pp. 1249, 1302), and its exhibition is prohibited by that section. Plaintiffs demanded that rule nisi issue, the film be declared obscene and subject to seizure, and defendants be temporarily and permanently enjoined from exhibiting the film within the jurisdiction of the court.

After a hearing, the trial judge held that the film "I Am Curious (Yellow)" is obscene and subject to seizure. It was ordered that all copies in the possession of defendants be seized, and that defendants, their associates, agents, and employees, be restrained and enjoined from distributing, exhibiting, or otherwise showing the film in any theater or other place where the public is permitted within the jurisdiction of the court.

Defendants filed an appeal from this judgment, making the following enumerations of error: The court erred (1) in finding and holding the film "I Am Curious (Yel-

low)" to be obscene; (2) in enjoining appellants from showing or exhibiting the film; (3) in ordering the film seized as contraband; (4) in proceeding with the complaint in the absence of statutory standards, provision for jury trial, and other constitutional safeguards; (5) in refusing a continuance to appellants where the complaint was unverified and no showing of urgency was made; (6) in not holding that the State was estopped or precluded from prosecuting the complaint because of the Federal Court of Appeals (404 F2d 196) holding the film not to be obscene; and (7) in finding and holding that *Code Ann.* §26-2101 extends to the exhibiting of an alleged obscene film to consenting adults.

1. The first error enumerated is the finding that the film is obscene.

The General Assembly has defined obscene material as follows: "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." *Code Ann.* §26-2101.

At the hearing the trial judge viewed the film before making his finding that it was obscene. Counsel for appellants have made the film available for our viewing of it, and we have done this.

The film was produced in Sweden. It shows a young Swedish woman questioning the social, political, and moral values of her own country and other countries. She meets a young man and immediately engages in

sexual intercourse with him. In extended scenes the young woman and her sex partner are shown completely nude and, in the course of the film, they engage in numerous acts of sexual intercourse, natural, unnatural, bizarre, and violent. In a dream fantasy the young woman murders and castrates her sex partner. All of these scenes are explicit.

Appellants urge that the two expert witnesses testifying in their behalf explained that the film's main or dominant appeal is to social, political, and moral issues, and that the scenes portraying sexual activity were essential to, and integrated with, the film's main political and moral themes, and do not exceed the standards embodied in other films and books being shown in the country.

Appellants contend that the failure of appellees to introduce any evidence of community standards to determine the question of obscenity requires a reversal of the judgment finding the film obscene, and cite Hudson v. United States, 234 A2d 903, a case in the District of Columbia Court of Appeals, in which a criminal conviction was reversed because the Government offered no evidence of community standards prevailing in the nation generally. We are, of course, not bound by that decision.

In Jacobellis v. Ohio, 378 U.S. 184 (84 SC 1676, 12 LE2d 793), in an opinion concurred in by two Justices of the United States Supreme Court, it was stated that the "contemporary community standards" by which they must determine the issue of the Federal constitutional rights of those convicted of crimes involving alleged obscene material were national standards. This

opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the Jacobellis case made its determination as to whether the film there reviewed was obscene under "national" community standards by viewing the film itself. It is our opinion that the trial judge could make a decision in the same manner.

After viewing the film ourselves, we state without hesitation that the trial judge did not err in finding it obscene, whether viewed by the standards of our local community or national standards. We have no doubt that its predominant appeal is to prurient interest in nudity and sex, and we feel certain that it would never have been brought from Sweden to this country had it not had in it the explicit sexual scenes, which its promoters, no doubt, thought would appeal to the prurient interests of persons in this country, to the profit of the promoters. If the film does not go substantially beyond the customary limits of candor in representing sexual matters, then there are no limits of candor in this country.

Appellants urge that the film communicates ideas of a political and social nature and cannot be said to be "utterly without redeeming social value." Our statute making the distribution of obscene material criminal provides that the material must be "utterly without redeeming social value" to come within the definition of obscenity. *Code Ann.* §26-2101.

In Roth v. United States, 354 U. S. 476 (3c) (77 SC 1304, 1 LE2d 1498), the majority opinion of the United

States Supreme Court stated: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

Since the Roth decision many decisions have been written in this country expounding and enlarging upon the statement there made. In Memoirs v. Massachusetts, 383 U. S. 413, 419 (86 SC 975, 16 LE2d 1) in an opinion concurred in by less than a majority of the United States Supreme Court it was said: "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive."

In Jacobellis v. Ohio, 378 U. S. 184 (3b), supra (in an opinion concurred in by two Justices) it was stated: "The constitutional status of allegedly obscene material does not turn on a 'weighing' of its social importance against its prurient appeal, for a work may not be proscribed unless it is 'utterly' without social importance."

The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. *Code Ann.* §26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the

people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.

In Roth v. United States, 354 U. S. 476, 485, supra, the court quoted from Chaplinsky v. New Hampshire, 315 U. S. 568, 571 (62 SC 766, 86 LE 1031), as follows: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . ."

The film we have viewed offends all sense of decency, and the fact that it contains some non-obscene matter does not preclude a finding that, considering it as a whole, it is utterly without redeeming social value. We affirm the ruling of the trial court that the film is obscene.

2. The sixth enumeration of error contends that the State was estopped or precluded from prosecuting the present complaint because of a holding by the United States Court of Appeals, Second Circuit, in the case of United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F2d 196.

The majority opinion in that case held that the film was not obscene because its dominant theme was not sex, and that it was not utterly without redeeming social

value. The courts of Georgia are not bound by this decision, and the trial judge did not agree with it. Nor do we. It was not error for the trial judge to refuse to follow the Federal court decision cited.

3. In the present case the district attorney did not bring a proceeding to determine whether he might seize the film as evidence in a criminal case, but brought an action for injunction against the showing of the film. In the second enumeration of error it is asserted that the court erred in enjoining appellants from showing or exhibiting the film.

We recognize the principle that equity will take no part in the administration of the criminal law. *Code* §55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: *Lofton v. Collins*, 117 Ga. 434 (3) (43 SE 708, 61 LRA 150); *Walker v. McNelly*, 121 Ga. 114 (1) (48 SE 718); *Edison v. Ramsey*, 146 Ga. 767 (92 SE 513); *Dean v. State*, 151 Ga. 371 (1) (106 SE 792, 40 ALR 1132); *Gullatt v. Collins*, 169 Ga. 538 (150 SE 825); *Rose Theatre, Inc. v. Lilly*, 185 Ga. 53 (1) (193 SE 866); *Atkinson v. Lam Amusement Co.*, 185 Ga. 379 (195 SE 156); *Forehand v. Moody*, 200 Ga. 166 (36 SE2d 321); *Norris v. Willingham*, 204 Ga. 441 (50 SE2d 22); *Thornton v. Forehand*, 211 Ga. 658 (87 SE2d 865); *Lee v. Hayes*, 215 Ga. 330, 331 (110 SE2d 624).

The exhibition of an obscene motion picture is a crime

involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public.

4. The fourth enumeration of error alleges that the court erred in proceeding with the complaint in the absence of statutory standards, provision for jury trial, and other constitutional safeguards.

We have held in the preceding division that the complaint could be maintained in equity, and there is no merit in the contention that there are no statutory standards, provision for jury trial, and other constitutional safeguards.

The complaint sought temporary and permanent injunction. The trial judge, on interlocutory hearing without a jury, restrained and enjoined appellants from exhibiting the film. The order did not indicate that it was interlocutory in nature. Direction is therefore given that the order be amended to show that it is not a permanent injunction, but only one to continue in force until the final hearing of the case by a jury. *Unity Cotton Mills v. Dunson*, 131 Ga. 258 (62 SE 179).

5. The third enumeration of error alleges that the court erred in ordering the film seized as contraband. Material determined to be obscene, after due hearing, would be contraband and subject to seizure and destruction. It would be against public policy to return obscene material to the owner. However, the destruction of the film must await a final determination of the question

of obscenity by a jury.

We therefore direct that the trial judge modify his order to show that no destruction of the film be made unless and until a final determination is made by the jury that it is obscene.

6. The fifth enumeration of error alleges that the court erred in refusing a continuance when no showing of urgency was made. Counsel made no contention that any particular witness could not be available for the hearing, but contended that he had not had time to prepare for it.

The film was being shown at the time of the hearing. This made it urgent that a determination of its obscenity be made immediately. The best evidence which could be obtained on the question of obscenity was the film itself, and the trial judge viewed the film before granting injunction. It was not an abuse of discretion to refuse a continuance to appellants.

7. There is no merit in the seventh enumeration of error, that the court erred in holding that the penal provision regarding obscene material (*Code Ann.* §26-2101) extends to the exhibiting of an obscene film to consenting adults.

Appellants cite Stanley v. Georgia, 394 U. S. 557 (89 SC 1243, 22 LE2d 542), in support of this contention. The Stanley case reversed a conviction for merely having possession of obscene material. It did not hold our statute prohibiting the exhibition of obscene material to be unconstitutional. The only purpose appellants had in possessing the film was to exhibit it to the public. The exhibition of such an obscene film to consenting adults is a crime in this state.

Judgment affirmed with direction. All the Justices concur.

APPENDIX B

RELEVANT SECTIONS OF THE GEORGIA CODE

Georgia Code 72-101. Definition in general.

A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

Georgia Code 72-102. Classes; public and private; definitions.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

Georgia Code 72-201. Manner of abatement.

Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county or his deputy. (Acts 1833, Cobb, 817.)

Georgia Code 72-202. Public nuisance, how restrained.

Private citizens may not generally interfere to have a

public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

CHAPTER 72-3. HOUSES OF PROSTITUTION

Georgia Code 72-301. Houses and contents declared a nuisance.

Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

Georgia Code 72-302. Action to enjoin nuisance, how and by whom brought; temporary injunction.

Whenever a nuisance is kept, maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained

of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

Georgia Code 72-303. Notice of hearing on application.

Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

Georgia Code 72-304. Injunction binding throughout judicial district. Contempt.

When an injunction shall have been granted it shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

Georgia Code 72-305. Trial; time; evidence of reputation of place.

The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

Georgia Code 72-308. Violation of injunction; punishment for contempt; proceedings.

In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

Georgia Code 72-309. Abatement, order of; contempt of court; fees for removing and selling property.

If the existence of the nuisance shall be established in an action as provided in this Chapter, and order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, structure, or place so directed

to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

Georgia Code 72-311. Bond to abate; release of property.

If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

CHAPTER 72-4. NUISANCES IN CITIES

Georgia Code 72-401. Manner of abatement; jurisdiction of police court.

If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city, whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the Sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817. Acts 1892, p. 64.)